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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 495

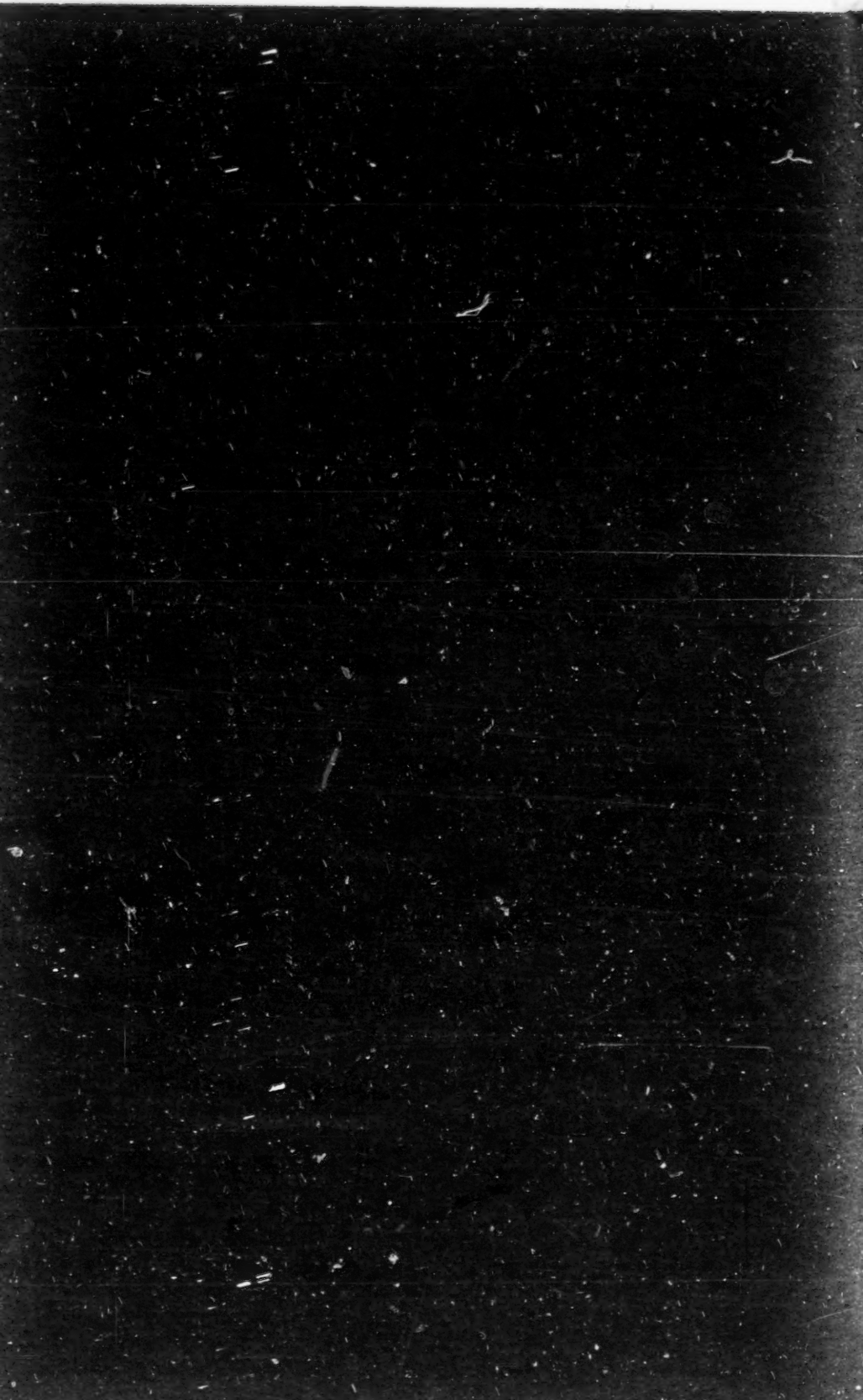
THE UNITED STATES OF AMERICA, PETITIONER

vs.

COMMODORE PARK, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1944
CERTIORARI GRANTED NOVEMBER 6, 1944



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620723—44——1

1 In United States Circuit Court of Appeals, Fourth Circuit

*Appendix to brief of appellant*

In the District Court of the United States for the Eastern District of Virginia

Civil Action No. 201

COMMODORE PARK, INCORPORATED, A VIRGINIA CORPORATION, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*Complaint as amended*

[Original Complaint Filed June 8, 1942]

1. The action arises under the Constitution and laws of the United States, and the jurisdiction of the Court is founded upon United States Code Annotated, Title 28, Section 41, subdivision 20. The claim does not exceed $10,000.00, and the action is brought within six years after the right accrued for which the claim is made.

2. Plaintiff is a corporation duly created and existing under the laws of the Commonwealth of Virginia, having its principal office in the City of Richmond in said State, and is the owner of valuable real property along with the appurtenant rights thereunto belonging, located, and being in the City of Norfolk, Virginia, and known as "Commodore Park." The said real property known as Commodore Park is a subdivision upon which the plaintiff has built many homes, and said property lies on the Western side of Granby Street in the City of Norfolk, Virginia, and ex-

2 tends in a westerly direction to the center of Mason's Creek in said City, and certain branches of said Creek, the same being more particularly described as follows:

All that certain tract of land, with the buildings and improvements thereon and the riparian and all other rights and appurtenances thereunto belonging, situated in the said City of Norfolk, Virginia, and more particularly described as follows, to wit:

Beginning at the point of intersection of the Western line of Granby Street as at present established with the Southern line of the property belonging to S. Burnell Bragg, thence Southwardly along the Western line of said Granby Street as at present established, to the intersection of said last named line with the Western line of Lot Number 100 as shown on the plat of West-

mont, which said plat is recorded in Norfolk County Clerk's office, Virginia, in Map Book 16 at page 70, but which said plat of Westmont has been recently vacated, and to which plat so vacated reference is now made only for the purpose of identifying the boundaries of the property hereby conveyed; thence Northwardly along the Western line of said Lot Number 100 and said line extended (said last named line and extension being the Eastern line of property formerly owned by Baylor T. Widgeon) to the center line of an 18 foot road hereinafter more particularly referred to; thence Westwardly along the center line of said 18 foot road to the intersection of said last named line with the Western line of a 12 foot right of way hereinafter more particularly referred to; thence Southwardly along the Western line of said 12 foot right of way to the Northern line of land now owned by T. H. Fisher's Estate; thence Westwardly along said last named line, through the center of
3 a cove to the center line of Mason's Creek, or as far therein as the law allows; thence Northwestwardly along the center line of said Mason's Creek or along a line as far therein as the law allows, to the intersection of the said last named line with the center line of a branch of Mason's Creek known as Darby's Creek (said last named creek dividing said property hereby conveyed from the property known as "Merrimack Park") or along a line as far in said Darby's Creek as the law allows; thence Northwardly along the center line of said branch of Mason's Creek known as Darby's Creek or along a line as far therein as the law allows, to the center line of a branch of said last named creek sometimes known as Oast's Creek (said last named creek dividing said property hereby conveyed from the property known as "Pamlico"); thence Eastwardly along said last named line to the Western line of said property belonging to said Bragg; thence Southwardly along said last named line to said Bragg's Southwest corner; thence Eastwardly along said Bragg's Southern line to the Western line of Granby Street, the point of beginning; save and except certain of the lots incorporated within said tract which have been sold by said plaintiff.

The portion of the property which has been subdivided is shown on a plat of the property known as Commodore Park, duly of record in the Clerk's office of the Corporation Court of the City of Norfolk, Virginia.

3. The plaintiff, in the development of its said property, has sold some of the lots shown on said plat, but is now and has been continuously since its acquisition of said property the owner of all of said lots and parcels adjacent to Mason's Creek, and all of said lots and parcels adjacent to Darby's Creek, a branch of said

Mason's Creek, and all of said lots and parcels adjacent to
4 Oast's Creek, a branch of Darby's Creek, and also the owner of a parcel not divided into lots lying on the Western corner of the property as is shown on said Plat, the last-named parcel being bounded on the West by Mason's Creek and on the North by property shown on said plat marked "Neta W. Barbee." Plaintiff is also the owner of the riparian rights incident to said property, and likewise is the owner of a small boat harbor entering into said Mason's Creek as is shown upon said plat. Plaintiff's rights and ownership in and to said Mason's Creek, Darby's Creek, and Oast's Creek extend to the center lines thereof.

4. Plaintiff was the owner of all of its said property prior to the 1st day of September 1940, and prior to said date the said Mason's Creek entered into the waters of Little Bay, a part of the waters of Hampton Roads; and the right to use the waters of said creek and to enjoy the same, and the continuance of said waters in their natural state was a part of the property and property rights of the said plaintiff. The said defendant after the plaintiff became the owner of its property, to wit, sometime between September 1, 1940, and December 31, 1941, filled in and closed the mouth and the outlet and inlet of said Mason's Creek and certain other portions of said creek, with the result that the same became a closed marsh, pond, and sewerage reservoir, and the defendant deposited mud, silt, and refuse on certain portions of plaintiff's property, and the plaintiff's property, property rights, and riparian rights, were accordingly taken and appropriated by the said defendant United States of America. The action of the said defendant was not in aid of navigation.

5. The said defendant when it filled and closed the mouth of Mason's Creek well knew that so doing it was taking from
5 the plaintiff its riparian rights, its property and property rights, and the rights of its successors and assigns, and as a proximate result of said taking was damaging the plaintiff by reducing the market value of other adjacent real property owned by it and which was not so taken; for all of which the said defendant undertook and promised to pay just compensation, and is obligated so to do, but hath hitherto wholly failed and refused to make and pay to plaintiff just compensation.

6. Just compensation for the property and property rights so taken as aforesaid, and the resulting damage to the contiguous or adjacent property of the plaintiff not so taken, is the sum or value of $10,000.00.

Wherefore plaintiff demands judgment against the United States of America in the sum of $10,000.00 and costs.

W. R. Ashburn,
*Attorney at Law,*
*501 Citizens Bank Building, Norfolk, Virginia.*

In United States District Court

*Motion for bill of particulars*

Filed August 5, 1942

United States of America by its attorneys, Sterling Hutcheson, United States Attorney for the Eastern District of Virginia, and H. H. Holt, Jr., Special Assistant to the Attorney General, moves this Court, pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure, that the plaintiff be ordered to furnish further and better particulars of the matters stated in the complaint in the following respects:

Item No. 1.—A description, together with lot and block number, of the lots alleged to have been sold by the plaintiff, covered in paragraph 3 of the complaint.

Item No. 2.—A statement of the basis of plaintiff's claim of liability existing on the part of the Government for dam-
6 ages by reason of the reduction in market value of other adjacent real property owned by the plaintiff which was not taken, as set forth in paragraph 5 of said complaint.

Item No. 3.—A copy of the plat referred to in said complaint, covering the property in question.

The defendant asserts that the complaint does not describe the land and/or damages complained of with sufficient definiteness and particularity to enable the proper preparation of a responsive pleading or to permit a proper defense of this action.

(S) STERLING HUTCHESON,
Sterling Hutcheson
*United States Attorney*
*for the Eastern District of Virginia.*

(S) H. H. HOLT, JR.
H. H. Holt, Jr.,
*Special Assistant to the Attorney General.*

A True Copy, Teste:

PAUL W. KEAR,
*Clerk.*
By P. J. RILEY, JR.,
*Deputy Clerk.*

In United States District Court

*Bill of particulars*

Filed September 17, 1942

Now comes the plaintiff and files this its bill of particulars in response to the written motion of the defendant, and says:

Item No. 1.—The lots which have been sold by the defendant are shown marked in yellow on the plat of Commodore Park attached hereto, so that defendant's items Nos. 1 and 3 as contained in the motion for bill of particulars are both answered by said plat.

7 Item No. 2.—Plaintiff claims that as a landowner of property bordering on Mason's Creek and Oast's Creek it was entitled to have the said Mason's Creek and Oast's Creek remain in the condition created by nature, and it was entitled to use, exercise, and enjoy riparian rights in said creeks; but nevertheless, in violation of the rights of said plaintiff, the defendant completely altered and changed the condition of said Mason's Creek and said Oast's Creek and took from the said plaintiff its riparian rights in said water courses, which were property rights, and appropriated the said riparian rights of the plaintiff to its own uses and purposes and completely changed the natural condition of said Mason's Creek and Oast's Creek.

As a direct and proximate consequence thereof all of the property owned by plaintiff immediately bordering on said Mason's Creek and said Oast's Creek was damaged and caused to decline in its fair market value, and the other property owned by plaintiff adjacent thereto which as subdivided did not immediately border on said Mason's Creek and said Oast's Creek was caused to decline in its fair market value, and plaintiff was unable to obtain for the portions thereof which have been sold as great a sum as it would have obtained save for the wrongful appropriation of the plaintiff's riparian rights in Mason's Creek and Oast's Creek by the defendant and save for the defendant's wrongful appropriation of Mason's Creek and Oast's Creek and the defendant's wrongful changing of the natural condition of said water courses, with damage to the said plaintiff of Ten Thousand Dollars ($10,000.00).

W. R. Ashburn,
*Attorney for Plaintiff,*
*501 Citizens Bank Building, Norfolk, Virginia.*

8 In United States District Court

*Motion to dismiss*

Filed September 25, 1942

The United States of America by its attorneys, Sterling Hutcheson, United States Attorney for the Eastern District of Virginia, and H. H. Holt, Jr., Special Assistant to the Attorney General, moves that the above-entitled cause be dismissed and in support of said motion represents to the Court that:

I

Plaintiff has failed to state a cause of action upon which relief may be granted plaintiff in this case.

II

Plaintiff has failed to specify, indicate, or designate the exact property which it claims to own, alleged to have been damaged by the acts of this defendant.

III

Plaintiff has failed to specify, indicate, or designate the alleged damage sustained by such property or properties as plaintiff may own.

IV

Plaintiff has claimed damage to property alleged to be owned by the plaintiff but which plaintiff admits was not taken by this defendant.

V

Plaintiff seeks compensation for property alleged to have been taken by reason of the filling in and closing of the mouth of Mason's Creek, while, at the same time, plaintiff seeks dam-
9 ages for property not so taken without showing or attempting to show the basis for such claims in said complaint.

VI

Plaintiff has failed to furnish this defendant with such particulars as will support the pretended cause of action sued upon herein or such as will enable this defendant to answer said complaint or to prepare this cause for trial notwithstanding the motion of this defendant filed herein for such bill of particulars as is provided under the rules of this Court.

VII

The purported bill of particulars filed herein by the plaintiff fails to furnish, set forth, or contain the particulars demanded by this defendant in its aforesaid motion for a bill of particulars and fails to contain or set forth such particulars as will support the pretended cause of action sued upon herein.

Wherefore defendant, United States of America, moves that said cause be dismissed at the cost of plaintiff herein.

STERLING HUTCHESON,
*United States Attorney*
*for the Eastern District of Virginia.*

H. H. HOLT, Jr.,
*Special Assistant to the Attorney General.*

In United States District Court

*Answer*

Filed October 14, 1942

The defendant, United States of America, for its answer to the complaint filed in the above-entitled cause, as amended, alleges:

10 FIRST DEFENSE

The complaint, as amended, fails to state claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The closing and filling in of the mouth of Mason's Creek and the enlargement and improvement of the Naval Air Base in and around the waters of said Mason's Creek and the waters of Little Bay, including the waters of Hampton Roads, and the acts of this defendant, pursuant to the Act of Congress of August 1, 1888, 25 Stat. 357; the Act of June 14, 1934, 48 Stat. 957, as amended by section 5 of the Act approved April 25, 1939, 53 Stat. 590; the Act of Congress approved May 5, 1939, 53 Stat. 757, and the Act of Congress approved February 26, 1931, 46 Stat. 1421, in closing and filling in said Mason's Creek and in the enlargement and improvement of the Naval Air Base located at Hampton Roads, Norfolk, Virginia, and in the taking or damaging of property, if any, were authorized and warranted under the Constitution of the United States and in particular under Article I, sec. 8 thereof, providing that the Congress of the United States shall have power, among other things, to regulate commerce with foreign

nations and among the several states and with the Indian tribes; that the closing and filling in of the said Mason's Creek and the enlargement and improvement of said Naval Air Base was in aid of and effected the improvement of navigation; that the rights of the plaintiff herein, if any existed, were and at all times have been subservient to the right, power, and authority of this defendant under the Constitution of the United States to
11 undertake and complete the closing and filling in of said Mason's Creek and the enlargement and improvement of said Naval Air Base in the exercise of defendant's power and authority to regulate commerce among the several states and to improve navigation upon the waters surrounding said Naval Air Base without compensation to plaintiff herein; that the effects of said project and of all of the acts of this defendant in connection therewith were to improve navigation in all of the said waters surrounding said Naval Base; that in the exercise of the power and authority granted to the Congress of the United States under the Constitution to regulate commerce and to improve navigation in said waters, plaintiff herein is not entitled to compensation for the alleged taking or damage to the riparian rights of the plaintiff, if any, upon said waters of Mason's Creek or to compensation for the alleged taking of, or damage to the lands or properties of the plaintiff, if any, resulting from any act or acts of this defendant in connection with the closing and filling in of said Mason's Creek and the improvement and enlargement of said Naval Air Base.

THIRD DEFENSE

Defendant denies the allegations of paragraph 1 of said complaint as amended; defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, and 4 of said complaint as amended and therefore denies the same; defendant expressly denies that it closed and filled in the mouth of the outlet and inlet of said Mason's Creek and certain other portions of said Creek with the result that the same became a closed marsh, pond, and sewerage reservoir and denies that plaintiff's property, property rights,
12 and riparian rights were taken, damaged, or appropriated by this defendant and denies that the act or acts of this defendant were not in aid of navigation; defendant denies each and every allegation contained in paragraph 5 of said complaint as amended; defendant denies each and every allegation contained in paragraph 6 of said complaint as amended.

FOURTH DEFENSE

That under date of September 12, 1940, the Secretary of War of the United States defined Mason's Creek, Virginia, as a re-

stricted navigation area and approved regulations closing the waters of Mason's Creek to all navigation excepting Government vessels and caused public notice to be given of the action of the Secretary of War in behalf of this defendant as appears from a copy of said public notice attached hereto and marked "Defendant's Exhibit A" and made a part of this answer; that by virtue of said public notice the public at large including plaintiff herein was duly notified of the proposed closing of the waters of Mason's Creek, which public notice constituted the first act on the part of this defendant in the closing of the said waters of Mason's Creek and in the enlargement and improvement of said Naval Air Base; that on said date plaintiff herein was not the owner of any lands or properties abutting upon or adjacent to said Mason's Creek and that plaintiff in the acquisition of any title to or interest in such lands or properties, if title to or interest therein was acquired by plaintiff, acquired title or interest in said lands and properties with full notice and knowledge of the proposed acts of this defendant; that by reason of said notice and knowledge plaintiff has suffered and sustained no loss or damage by reason of any act or acts on the part of this defendant.

13 FIFTH DEFENSE

That on September 12, 1940, the Secretary of War of the United States, acting in behalf of this defendant, defined said Mason's Creek, Virginia, as a restricted navigation area and approved regulations closing the waters of said Mason's Creek to all navigation excepting Government vessels and caused public notice attached hereto and marked "Defendant's Exhibit A" and made a part of this answer; that on said date plaintiff was not the owner of record of any lands or properties abutting upon or adjacent to said Mason's Creek and that if the act or acts of this defendant in connection with the closing and filing in of said Mason's Creek and the enlargement and improvement of said Naval Air Base constituted a taking of private property or damage thereto this defendant did not expressly or impliedly promise to pay plaintiff herein any compensation for said taking or said damage since this defendant had no notice, actual or constructive, of the purported title or interest of plaintiff in said properties; that if any cause of action arose against this defendant by reason of the closing and filling in of said Mason's Creek and the enlargement and improvement of said Naval Air Base and the taking or damage to lands or property involved therein, said cause of action, if any, did not arise in favor of plaintiff herein nor has this defendant at any time subsequent to September 12, 1940, performed any act

or acts in connection with the closing and filling in of said Mason's Creek and the enlargement and improvement of said Naval Air Base of such a nature or character as to amount to a promise of payment, express or implied, to the plaintiff for any taking
14 or damage to the lands or properties abutting upon or adjacent to said Mason's Creek.

Wherefore, defendant prays that the complaint filed herein as amended be dismissed and that this defendant have its costs herein.

UNITED STATES OF AMERICA,
By HARRY H. HOLT, Jr.,
*Special Assistant to the Attorney General.*

## EXHIBIT A

### PUBLIC NOTICE

1. Under date of September 12, 1940, the Secretary of War approved regulations closing the waters of Mason Creek to all navigation excepting Government vessels. The regulations are as follows:

DANGER ZONE REGULATIONS

Pursuant to the provisions of Chapter XIX of the Army Act approved July 9, 1918 (40 Stat. 892; 33 U. S. C. 3), Mason Creek, Virginia, is defined as a restricted navigation area and the following regulations relating thereto as hereby prescribed.

204.53 Mason Creek, Va.; Naval Operating Base, Norfolk, Va.

(a) The waters of Mason Creek shall be closed to all navigation excepting vessels owned by, operated, or in the employ of the United States.

15 (b) These regulations shall be enforced by the Commandant, Fifth Naval District, Norfolk, Virginia, and such persons or agencies as he may designate.

Approved September 12, 1940.

(S) HENRY L. STIMSON,
*Secretary of War.*

(S) JOHN F. CONKLIN,
John F. Conklin,
*Lieut. Col., Corps of Engineers,*
*District Engineer.*

U. S. Engineer Office, 415 Post Office & Courthouse, Norfolk, Virginia, September 30, 1940.

Certified to be a true and exact copy.

(S) WM. A. COUPE,
Wm. S. Coupe,
*Lieut. CEC–V(S), USNR.*

In United States District Court

*Findings of fact and conclusions of law*

**Filed July 23, 1943**

NATURE OF ACTION

This is an action by plaintiff against the United States of America, pursuant to Title 28, Sec. 41 (20), to recover just compensation for property and riparian rights of the plaintiff alleged to have been taken by the United States in connection with the enlargement and extension of the Hampton Roads Naval Operating Base (hereinafter called the "Base"), in the City of Norfolk. The real estate owned by plaintiff and affected by said works of the United States, is described as follows:

All that certain tract of land, with the buildings and improvements thereon and the riparian and all other rights and appurtenances thereunto belonging, situated in the said City of Norfolk, Virginia, and more particularly described as follows, to wit:

16 Beginning at the point of intersection of the Western line of Granby Street as at present established with the Southern line of the property belonging to S. Burnell Bragg, thence southwardly along the western line of said Granby Street as at present established, to the intersection of said last named line with the western line of Lot Number 100 as shown on the plat of Westmont, which said plat is recorded in Norfolk County Clerk's office, Virginia, in Map Book 16 at page 70, but which said plat of Westmont has been recently vacated, and to which plat so vacated reference is now made only for the purpose of identifying the boundaries of the property hereby conveyed; thence northwardly along the western line of said Lot Number 100 and said line extended (said last named line and extension being the eastern line of property formerly owned by Baylor T. Widgeon) to the center line of an 18 foot road hereinafter more particularly referred to; thence westwardly along the center line of said 18 foot road to the intersection of said last named line with the western line of a 12 foot right of way hereinafter more particularly referred to; thence southwardly along the western line of said 12 foot right of way to the northern line of land now owned by T. H. Fisher's Estate; thence westwardly along said last named line, through the center of a cove to the center line of Mason's Creek, or as far therein as the law allows; thence northwestwardly along the center line of said Mason's Creek or along a line as far therein as the law allows, to the intersection of the said last named line with the center line of a branch of Mason's Creek known as Darby's Creek (said last

named creek dividing said property hereby conveyed from the property known as "Merrimack Park") or along a line as far in said Darby's Creek as the law allows; thence northwardly
17 along the center line of said branch of Mason's Creek known as Darby's Creek or along a line as far therein as the law allows, to the center line of a branch of said last named creek sometimes known as Oast's Creek (said last named creek dividing said property hereby conveyed from the property known as "Pamlico"); thence eastwardly along said last named line to the western line of said property belonging to said Bragg; thence southwardly along said last named line to said Bragg's southwest corner; thence eastwardly along said Bragg's southern line to the western line of Granby Street, the point of beginning; save and except certain of the lots incorporated within said tract which have been sold by said plaintiff.

In substance, the particular acts of the Navy Department alleged to have resulted in the taking of plaintiff's land and riparian rights were the closing of Mason's Creek, a navigable stream on which the land bordered, and depositing mud and silt on the shore thereof and on plaintiff's land lying between high and low water marks. The claim asserted by plaintiff does not exceed $10,000.00 and is based upon an implied contract with the United States of America to pay just compensation for the land and riparian rights of plaintiff alleged to have been taken by the United States of America.

Under the Virginia law plaintiff's land extends to ordinary low water mark where it borders on the navigable part of Mason's Creek (Code 1942, Sec. 3574; Scott *v.* Doughty, 124 Va., 358, 97 S. E., 802).

DEFENSES

In its answer the United States admits the filling and closing of Mason's Creek but contends that these acts were performed in aid of navigation in Willoughby Bay (sometimes called
18 Little Bay), a navigable body into which Mason's Creek flowed before the filling and closing complained of. The Government further contends that public notice of the intended closing of Mason's Creek and of the alleged improvement of navigation in said Bay was given before plaintiff acquired title to the land claimed to have been damaged by said acts of the Government. It denies that there was any physical invasion of plaintiff's land by the depositing of mud and silt thereon except such as was done at the request of plaintiff and other interested property owners.

FINDINGS OF FACT

Plaintiff acquired legal title to its land by deed from George R. Eldridge and wife, dated August 20, 1940, and admitted to record September 13, 1940. The testimony shows without conflict, that the City of Norfolk acquired title to the land prior to March 20, 1940, through a sale made to satisfy the lien of delinquent taxes due the City, the former owners having defaulted in the payment of the taxes; and that in March 1940, F. S. Richeson, who later was made president of plaintiff (a corporation which the purchasers contemplated forming to take title and develop the property), made the City an offer, which was formally accepted on April 2, 1940, although the deed from the City to said Eldridge was dated March 20, 1940. The purchase price was paid to the City in June 1940 by Richeson. Pending the adjustment of claims of a third party to rights in streets in the property, shown on a former plat thereof (Westmont Plat) already of record, the City at the direction of Richeson, conveyed the property to Eldridge, Richeson's father-in-law, and Eldridge merely held title awaiting the organization of the proposed corporation. Under these
19 circumstances, plaintiff's title for the purposes of this case, may properly be regarded as dating from June 1940, the time when the deal finally closed, although plaintiff corporation was not actually created and organized until after June 1940. After obtaining title to the property, plaintiff proceeded to plat it into blocks, streets, and 253 building lots and erected 154 residences on interior lots and sold or rented the same. At the time of the trial 68 of the 253 lots had not been sold and the six-acre tract had not been sold or platted into lots. Plaintiff did not offer for sale lots numbered 206, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, and 222 and the six-acre tract. It regarded those lots as more valuable than the other lots and marketed the less desirable interior lots first. As a part of its scheme of developing and selling the property, plaintiff set aside a lot fronting 100 feet on Mason's Creek for a small boat harbor, designated "Small Boat Harbor" on the plat (Exhibit 5), for the benefit of the purchasers of lots, and obligated itself to dredge out and prepare this small boat harbor for that use. Plaintiff also caused various improvements in the form of utilities to be installed in the development, among them water, sewer, gas mains, and the like.

The Hampton Roads Naval Operating Base was established by the Navy Department about 1917–1918, pursuant to authorization by Congress. In 1940 the Navy Department decided to greatly enlarge and expand the Base, especially its aviation facilities. Plans were prepared and numerous land-condemnation proceed-

ings instituted in this Court at Norfolk for the acquirement of lands located in the City of Norfolk determined to be necessary for the purpose, as follows:

20 On July 11, 1940, a petition and a declaration of taking were filed for the acquirement of 1,034 acres. The pleadings set forth that these were "lands appraised for Naval Air Station Expansion, Naval Operating Base, Norfolk, Virginia, approved May 28, 1940, together with all the improvements thereon"; that they were taken under authority of the Acts of Congress therein cited; and further that "the use for which the same is acquired is for the purpose of utilizing same as and for a site for an extension to the Hampton Roads Naval Operating Base, Norfolk, Virginia, and that the estate and title hereby taken in said land for the public use aforesaid is the fee simple and absolute title."

Additional condemnation proceedings for the same or closely related defense purposes, as set forth in the declarations of taking and petitions in the later proceedings were filed and lands adjoining those taken in the first proceeding, all in the City of Norfolk, taken as follows:

October 9, 1940, 7.1 acres (Misc. 6602); July 21, 1941, 226.973 acres (Misc. 6684); Nov. 5, 1941, 87.47 acres (Misc. 6731); March 25, 1942, 30.2 acres (Misc. 6766) "for the expansion of barracks and subsistence facilities for use in connection with the Naval Air Station, Norfolk, Virginia"; February 6, 1942, 508.38 acres (Misc. 6760) "for the expansion of the Naval Operating Base, Norfolk, Virginia"; and April 9, 1942, several hundred lots (the acreage is not given in the pleadings), together with all right, title and interest in and to any and all street ends and streets platted, dedicated or accepted and lying between the heavy lines and the waters of Willoughby Bay, shown on Exhibits "A" and "B" attached to the declaration of taking and made a part thereof, and together with all right, title and interest in and to ripar-

21 ian rights and rights in and to the adjacent waters of Willoughby Bay, "for immediate public use by the United States of America as additional spoils area."

The acts of Congress pursuant to which all these lands and rights were acquired, are:

(a) An act approved June 14, 1934, entitled "An Act providing for the acquisition of additional lands for the Naval Air Station at Hampton Roads Naval Operating Base, Norfolk, Virginia" (48 Stat. 957). That act provided for the acquisition of approximately 540 acres of land bounded by Mason's Creek on the north and east, Boush Creek on the west and the Virginian Railway on the south, but failed to appropriate the funds necessary for acquiring the land referred to.

(b) An act approved April 25, 1939, entitled "An Act to authorize the Secretary of the Navy to proceed with the construction of certain public works and for other purposes," which latter act amended said Act of June 14, 1934 (quoted above), as follows:

SEC. 5. The Act of June 14, 1934 (48 Stat. 957), after the enacting clause is hereby amended to read as follows:

"That the Secretary of the Navy be, and he hereby is, authorized to acquire, by purchase or condemnation, additional lands adjacent to the Hampton Roads Naval Operating Base, Norfolk, Virginia, such lands lying north of the Virginian Railway and west of Granby Street. The sum of $500,000 authorized by section 1 of the bill H. R. 4278, as enacted, for the acquisition of land at or in the vicinity of Norfolk, Virginia, shall be available for the purposes of this Act."

(c) Provisions found in an act approved May 25, 1939, entitled "An Act making appropriations for the Navy Department
22 and the Naval Service for the fiscal year ending June 30, 1940, and for other purposes," (53 Stat., 757–782) * * *:

Base facilities, Navy: Additional facilities as authorized by the Act approved April 25, 1939 (Public, Numbered 43, Seventy-sixth Congress), including the acquisition of land and the construction of buildings and accessories, at or in the vicinity of Kaneohe Bay, Hawaii; Midway Island; Johnston Island; Palmyra Island; Kodiak, Alaska; Sitka, Alaska; San Juan, Puerto Rico; Pensacola, Florida; Jacksonville, Florida; Nanana River, Florida; Peake Harbor, Hawaii; and Tongue Point, Oregon; *and the acquisition of land at Norfolk, Virginia*, and Quonset Point, Rhode Island, $63,000,000. [Italic supplied.]

Under date of June 28, 1940, the Bureau of Yards and Docks of the Navy Department entered into a contract with Virginia Engineering Company, entitled "Contract NOy–4158, Aviation shore facilities at the Naval Air Station, Norfolk, Virginia" (Exhibit 10 in this cause), for work to cost $13,700,000.00. The title of the project was designated in the contract as "Aviation Training Facilities." The first and largest item of work specified was, "Bulkheads, dredging, and fill and preparation of landing field, $2,960,000.00." The other items specified in the contract were for erecting structures upon or in the land, and changes in the location of roads, pipe lines, and the like. None of the other items, mentioned or referred to navigation or the improvement thereof. This contract, although preceding the filing of the first condemnation suit (that of July 11, 1940), referred to work to be done on or near the lands about to be acquired in that suit.

None of plaintiff's land was included in any of the condemnation proceedings. The plat or map of the lands (1,034 acres)
23 taken in the condemnation proceeding filed July 11, 1940 (a copy of which map is filed herewith), shows that the lands taken lay on both sides of Mason's Creek and Theleball's Creek, the latter the south arm or prong of Mason's Creek. Mason's Creek flowed into the Bay and thence into Hampton Roads.

After the condemnation of the 1,034 acres of land and the making of the contract above referred to, the Navy Department caused the contractor to construct bulkheads, dykes, and retaining walls in Mason's Creek above (south of) where that stream flowed into the Bay, and caused enormous quantities of sand, mud, and silt to be dredged by hydraulic means from the bed of the Bay and discharged into those parts of Mason's Creek and Theleball's Creek enclosed by the bulkheads, dykes, and retaining walls and the adjoining shores, filling the parts of those streams so enclosed, to the approximate level of the adjoining high lands, and thereby reclaimed several hundred acres of lands which had theretofore been parts of the beds of Mason's and Theleball's Creeks. The land thus reclaimed has been incorporated in the Base as a permanent part thereof. Filed herewith, as a part of this memorandum, are three maps:

(1) A map entitled "Norfolk and Vicinity City Planning Commission, Norfolk, Virginia, March 1921, Revised May 1941." This map shows Mason's Creek and Willoughby or Little Bay before any dredging or filling was done, and also shows a general outline of the Naval Operating Base including therein all of the lands taken in the condemnation proceedings prior to 1942;

(2) A map of the lands included in the condemnation proceedings filed July 11, 1940 (1,034 acres). This map shows the lands as they were at the time of the taking.

24 (3) Another map showing in red the parts of Mason's Creek including Theleball's Creek, that were filled as hereinabove related.

In extending and enlarging the Base facilities the Navy Department decided to create a greater depth of water in the southerly end of the Bay for the taking off and landing of large navy seaplanes, the depth desired being from 10 to 14 feet. Spoils areas were needed on which to deposit the dredged material. The first spoils area selected was "Boush Creek," a part of the 1,034 acres taken on July 11, 1940. That was soon filled. The Navy Department thereafter applied to the War Department for permission to construct dykes, bulkheads, and retaining walls in Mason's and Theleball's Creeks and to fill the portions of those

bodies of water thus enclosed, with materials dredged from the Bay. (See application for permit dated May 9, 1941, quoted below.) Approximately two-thirds of these streams lying west of Granby Street and north of the Virginian Railway, were filled with the dredged materials. When that area was exhausted the Government (April 9, 1942, in Misc. suit 6773 above referred to), condemned a strip of land around the southern end of the Bay, commencing at the then eastern end of the Base and Ridgewell Avenue, and following generally the meanderings of the Bay shore to a point on the northeasterly side of the Bay about midway between 8th View and 9th View Streets. The Navy Department constructed about 4,000 yards of high dykes around the land condemned April 9, 1942, to hold the dredged materials thereon.

25 As a result of the condemnation of these shore lands out to low water, and the filling operations that followed there, the upper end of the Bay down to said point between 8th View Street and 9th View Street and to a line that would extend from there directly across the Bay to the old part of the Base, has been effectively incorporated in the Base as a part thereof, and closed to all commerce and all navigation except navy seaplanes and Base activities. Private vessels are not permitted to enter that area except by special permission of the authorities of the Base. (Certain dredging referred to in the testimony, for the benefit of the Old Point ferryboats, is about a mile northwest from the nearest part of the dredging in the upper or south end of the Bay and had no connection with that dredging.)

The lands condemned by the United States in the proceeding filed on April 9, 1942 (Misc. 6773, above referred to) are shown in red lines on Plat 1, herewith filed and already referred to as "Norfolk and Vicinity City Planning Commission, Norfolk, Virginia, March 1921, Revised May 1941."

As will appear from an examination of Plat 3, filed herewith showing the filling in Mason's Creek, that stream was filled to a point near where the Creek flowed into the Bay. That point is about one mile, on a straight line, from the nearest part of plaintiff's lands, and a still greater distance, if the meanderings of the Creek are followed.

Applications were made by the authorities in charge of the Base to the War Department relative to dredging in the Bay, the construction, location, and types of bulkheads, retaining walls, and dykes, and the filling of Mason's Creek and Theleball's Creek.

26 These applications and the permits granted by the War Department are copied below in chronological order from the record in this case:

NAS

COMMANDANT'S OFFICE,
NAVAL OPERATING BASE,
*Norfolk, Virginia, July 12, 1940.*

From: Commandant.
U. S. District Engineer, War Department,
415 Post Office Building, Norfolk, Va.

Subject: Air Station Expansion—Dredging Willoughby Bay.

1. Development of lands east and southeast of the Naval Operating Base just acquired for Air Station expansion will include a large seaplane operating base on the south shore of Willoughby Bay. One of the principal items of work will be improving the navigability of Willoughby Bay by dredging all or a large part of it to depths of from 10 to 14 feet below m. l. w. so as to provide sufficient areas and depths of water for large patrol seaplanes, which will operate from the Base. Materials dredged from Willoughby Bay will be deposited in creeks, sloughs, and on low areas of lands bordering Boush and Mason's Creeks behind steel or other types of bulkheads. In order to provide sufficient areas to hold all of the material which will have to be dredged from Willoughby Bay to create required areas and depths for seaplane navigability, it may be necessary to fill all or a large part of Boush Creek from its mouth to the Virginian Railway trestle. In this case drainage for areas south of the Virginian Railway trestle and the lands bordering on both sides of Boush Creek north of the Virginian Railway trestle, would be taken care of by a large culvert or open canal constructed about in the center line of Boush Creek.

27 2. The amount of dredging that will be required in Willoughby Bay, locations and types of bulkheads to retain dredged material, and portions of creeks and lands to be filled can only be determined after hydrographic and topographic surveys now being made are completed. It is expected that these surveys will be completed within the next few weeks, at which time formal application for permit to dredge in Willoughby Bay, construct bulkheads, fill creek sloughs, etc., will be made.

A-1-1/NAS. JCP:RRV.

HEADQUARTERS FIFTH NAVAL DISTRICT,
NAVAL OPERATING BASE,
*Norfolk, Virginia, July 23, 1940.*

From: Commandant.
To: U. S. District Engineer, War Dept.,
415 Post Office Bldg., Norfolk, Va.
Subject: Dredging Willoughby Bay.
Reference: Comdt. ltr. to U. S. Dist. Engr., NAS July 12.
Enclosure: Tracing of NOB dwg. 4009 and 8 prints.

1. The development of a large seaplane operating base on the south shore of Willoughby Bay, which is included as a part of the Air Station expansion, will necessitate improving the navigability of the waters of this Bay by dredging all or a large part of it to depths of from 10 to 14 feet below M. L. W. so as to provide sufficient areas and depths of water for the large patrol seaplanes which will operate from the base. A rough estimate of the amount of material necessary to be removed is 18,000,000 cubic yards. The areas from which it will be dredged are indicated on the Enclosure, and in no case will dredging be done closer to the low water line of Willoughby Spit than 600 feet.

28 2. The material dredged from Willoughby Bay will be deposited in creek sloughs and on low area of lands bordering Boush and Mason's Creeks behind steel or other suitable types of bulkheads or retaining walls. A typical section of bulkhead is shown on the Enclosure. In order to provide sufficient areas to hold all of the material which will have to be dredged from Willoughby Bay to create required areas and depths for seaplane navigability, it will probably be necessary to fill all or a large part of Boush Creek from its mouth to the Virginian Railway trestle. Drainage for the areas bordering Boush Creek south of the Virginian Railway trestle and the lands bordering on both sides of Boush Creek north of the Virginian Railway trestle will be taken care of by a large culvert or open canal constructed about on the center line of Boush Creek.

3. It is requested that the necessary permit for the above-described work be issued at the earliest practicable date so as not to delay the start of the dredging.

WAR DEPARTMENT

PERMIT FOR FEDERAL AGENCIES

N-27/1355

DIVISION ENGINEER,
SOUTH ATLANTIC DIVISION,
*Richmond, Va., July 27, 1940.*

TO COMMANDANT,
*Hqrs. Fifth Naval District,*
*Naval Operating Base, Norfolk, Virginia.*

The structures and work set forth in the plans hereto attached marked, "Proposed dredging in Willoughby Bay, Norfolk, Va. Application by Fifth Naval District, Norfolk, Va., proposed by Commandant, Fifth Naval District (Bureau or
29 establishment) and presented in your letter dated July 23, 1940, comprising: the construction of bulkheads and dredging, the dredged material to be deposited behind bulkheads and in Boush Creek and adjacent low lying areas, in Willoughby Bay, at Norfolk, Va., have been recommended by the Chief of Engineers and are authorized by the Secretary of War under the provision of (30 Stat. 1151) subject to the following requirements:

(a) That the execution of the work shall be subject to such supervision and control by the District Engineer, Engineer Department at Large, in charge of the locality as he may find necessary in the interests of navigation.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench the formation of permanent ridges across the bed of the waterway shall be avoided, and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That no restriction other than provided by law shall be placed on the full and free use by the public of all navigable waters at and adjacent to the work or structure.

(d) That if future operations by the United States for the improvement of navigation require an alteration in the position of the structure of work herein authorized, or if in the opinion of the Secretary of War it shall cause an unreasonable obstruction to free navigation, the agency having the work in custody shall, upon due notice from the Secretary of War, remove or alter it so as to render navigation reasonably free, easy, and unobstructed.

(e) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the Bureau of Lighthouses, Department of Commerce, shall be installed and maintained.

(f) That the said District Engineer shall be promptly notified, in writing, of the commencement of work, suspension of work, if for a period of more than 1 week, resumption of work, and its completion.

(g) That the authorization herein conferred shall terminate if not availed of before the 31st day of December 1943.

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE,
415 POST OFFICE AND COURTHOUSE,
*Norfolk, Va., July 29, 1940.*

File No. 3037/6 Miscl.
Subject: Permit to construct bulkhead and dredge in Willoughby Bay, Va.
To: The Commandant, Naval Operating Base, Norfolk, Va.

1. There is inclosed herewith permit signed by the Division Engineer, South Atlantic Division, July 27, 1940, authorizing construction of bulkheads and dredging in Willoughby Bay, Va.

2. It is requested that this office be advised when the work is commenced and when it is completed.

WAR DEPARTMENT

PERMIT FOR FEDERAL AGENCIES

OFFICE, CHIEF OF ENGINEERS,
*Washington, D. C., May 9, 1941.*

To The COMMANDANT,
*Fifth Naval District,*
*Naval Operating Base, Norfolk, Virginia.*

The structures and work set forth in the plans hereto attached marked "Proposed Naval Air Station Extension, proposed culverts and fill areas and proposed culverts and dike, Naval Operating Base, Norfolk, Virginia" proposed by Naval Operating Base, Norfolk, Virginia (Bureau or establishment), and presented in your undated letter, your file NOy–4158 comprising the placing of fill retained by dikes and the construction of a culvert in Mason's Creek, at Naval Operating Base, Norfolk, Virginia, are authorized by the Secretary of War under the provisions of (30 Stat. 1151) subject to the following requirements:

(a) That the execution of the work shall be subject to such supervision and control by the District Engineer, Engineer Department at Large, in charge of the locality as he may find necessary in the interests of navigation.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes
32 that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench the formation of permanent ridges across the bed of the waterway shall be avoided, and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway.

(c) That no restriction other than provided by law shall be placed on the full and free use by the public of all navigable waters at and adjacent to the work or structure.

(d) That if future operations by the United States for the improvement of navigation require an alteration in the position of the structure of work herein authorized, or if in the opinion of the Secretary of War it shall cause an unreasonable obstruction to free navigation, the agency having the work in custody shall,

upon due notice from the Secretary of War, remove or alter it so as to render navigation reasonably free, easy, and unobstructed.

(e) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the Bureau of Lighthouses, Department of Commerce, shall be installed and maintained.

(f) That the said District Engineer shall be promptly notified, in writing, of the commencement of work, suspension of work, if for a period of more than 1 week, resumption of work, and its completion.

33 (g) That the authorization herein conferred shall terminate if not availade of before 31st day of December, 1944.

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE,
415 POST OFFICE AND COURTHOUSE,
*Norfolk, Va., May 13, 1941.*

Subject: Permanent Closure of Mason Creek to all Navigation.
To: The Commandant, Fifth Naval District, Naval Operating Base, Norfolk, Va.

1. Referring to your letter of May 3, 1941, your file NOy–4158, requesting that the regulations approved September 12, 1940, by the Secretary of War, be amended so that Mason Creek be permanently closed to all navigation, including Government vessels. This request was made in connection with your separate request for a permit to place earth fills and dikes and drainage culvert in Mason Creek and its south branch (Theleball's Creek).

2. Final action by the Office, Chief of Engineers, U. S. Army, on your request for amended regulations, is expressed in the following quoted opinion by the Chief of Engineers: "Confirming telegram of this date, permit has been issued today by the Acting Chief of Engineers authorizing deposit of fill and construction of culvert in Mason Creek by the Fifth Naval District. Since basic letter requests amendment of regulations to permit filling of Mason Creek and this fill has been authorized by permit, further action toward amendment appears to be unnecessary."

The location of plaintiff's land, which is the subject of this suit, is indicated on the plat of "Norfolk and Vicinity City Plan-
34 ning Commission, Norfolk, Virginia, March 1921, Revised May 1941." It lies on the easterly side of Mason's Creek and west of Granby Street, and is indicated on that plat in red letters "Plaintiff's Land"; also in the same manner on the plat of the 1,034 acres condemned July 11, 1940, at upper left center. It is bounded on the north in part by Oast's Creek, the latter a

tributary of Mason's Creek, which extends eastwardly from Mason's Creek to Granby Street.

Mason's Creek afforded a ready, convenient outlet from plaintiff's land into Willoughby Bay, and Hampton Roads by motorboats and other vessels of light draft. That stream, so far as the evidence discloses, had never been improved by governmental action, but, in its natural state, was a very attractive tidal, navigable stream.

The branch of Mason's Creek referred to as Oast's Creek, lying on the north of plaintiff's land, is not a navigable stream. Down to near where it joins the northerly prong of Mason's Creek, prior to the action of the Navy in dredging it as related herein below, it consisted only of a ditch or small nonnavigable channel dug by W. P. A., to aid mosquito control. The land between that channel and plaintiff's high land to the south was grassy, salt marsh, covered with water only at high tide, and added very little, if any, real value to the high land.

The shores on the westward and northwestward sides of plaintiff's land bordered on the navigable part of Mason's Creek and were high, firm, sandy shores, slanting down gradually between high and low water marks. The waterfront lots on that side before the filling and closing above described, were desirable for waterfront residential property. The presence of navigable water and the riparian rights such as fishing, boating, and the like, incident to the land, contributed very substantially to both its intrinsic and fair market value.

By filling and closing Mason's Creek all of plaintiff's riparian rights were permanently taken. The part of Mason's Creek not filled was converted into a lake without any outlet, sewers and surface drainage emptied therein and the water became stagnant and filthy. The water used in conveying through pipes the dredged materials from the Bay to the parts of Mason's Creek filled, overflowed the bulkheads and dykes, and carried great quantities of mud and silt into the parts of Mason's Creek not filled, and much of it settled along the shore and to a substantial depth on plaintiff's land lying between high and low water marks, and permanently converted that land into undesirable spongy mud bottom.

The conditions resulting from the filling of the lower reaches, the closing of Mason's Creek and the overflow of silt and mud from the spoils area into the unfilled part of the stream, caused vigorous protests by the people living in the vicinity. Responding to such protests the Navy Department undertook to eliminate these conditions. It caused a culvert to be constructed from the unfilled part of Mason's Creek through the Base to the head of the Bay, at a cost of approximately a half a million dollars. This

culvert is about 20 feet wide at the bottom and slightly wider at the top. It does not permit access to the Bay even by rowboat, but is closed at the point where it enters the Base area, with a metal grate, the bars of which are only a few inches apart. It was contemplated that the culvert would properly drain the unfilled reaches of Mason's Creek and protect the Naval Base and the private lands bordering on the unfilled part of Mason's Creek, against overflow. It does afford sufficient drainage to pre-
36 vent overflow under normal conditions. The conditions in the unfilled part of Mason's Creek and plaintiff's property were inspected by the Judge on one occasion, accompanied by the representatives of the parties, and their counsel, and on another occasion by him alone. He also inspected the conditions in the Base. While the culvert will under normal conditions prevent overflow into the Base and over adjoining privately owned lands and affords some relief to the damaging conditions brought about by filling and permanently closing Mason's Creek, the water in the unfilled part of the Creek is still semistagnant and not fairly comparable in freshness or cleanliness to what it was before the filling and closing. Tidal action there is substantially reduced.

In the effort to relieve the situation the Navy Department also caused a channel to be dredged in the remaining part of Mason's Creek west of Granby Street and in Oast's Creek, also, to a depth in fact greater than existed before the dredging and filling operations. This channel extends in an irregular semicircle from where Granby Street intersects the southern prong of Mason's Creek, and follows the general courses of the shore, but is some distance out from the shore line, to Oast's Creek and thence eastwardly up Oast's Creek to where that stream intersects Granby Street. The dredged channel is indicated in red lines on Map 3, filed herewith.

The dredging of this channel has not resulted in relief from the damaging effects of the filling and closing of Mason's Creek, because the channel has no outlet except the culvert. The drainage afforded by the culvert is not sufficient to maintain freshness in the water through tidal action. For example, approximately 60 to 70 percent of the surface area of Mason's and Thelehall's
37 Creeks, that lay west of Granby Street and north of the Virginian Railway has been filled, leaving approximately 30 to 35 percent within those boundaries not filled. To this unfilled area within those boundaries, there must be added the extensive areas of salt marshes and low lands lying east of Granby Street which constitute the head reaches of Mason's Creek. The width of the channel of Mason's Creek at the bridge over it (the narrowest part) was about 550 feet. The width of the culvert is 20 feet. The depth of the culvert and that of Mason's Creek

at the bridge before the Creek was closed are apparently fairly comparable. The channel, 20 feet wide, is expected to drain and fill through tidal action approximately 40 percent of the whole area that was formerly served by a channel 550 feet wide. In other words, a culvert of only about 1/27th the dimensions of the 550 foot channel is designed to drain and fill approximately 40 percent of the whole area.

Plaintiff vigorously contends also that the dredging done by the Navy Department in efforts to lessen or eliminate the damages resulting from filling and closing Mason's Creek, not only failed to achieve that result but increased the earlier damages by causing additional mud and silt to settle on plaintiff's shore and its land lying between high and low water marks, and by the pumping of large quantities of mud and silt into small coves and inlets in its land, particularly those on the Oast's Creek side.

Careful consideration of the evidence pertaining to this additional claim, in the light of views of plaintiff's land, has led to the conclusion that the claim for additional damages alleged to have resulted from the (relief) dredging has not been sustained.

Large quantities of mud and silt were, in the later operation,
38 pumped into some of the coves and inlets and onto parts of the grass marshes in Oast's Creek. The land in those inlets and coves, and the grassy marshes also had very little, if any, real value, when considered alone or in connection with plaintiff's adjoining high land. It is concluded therefore that that filling has done no material damage thereto or to the adjoining high lands, in excess of the benefit resulting from the partial filling of those low marshes, inlets, and coves. In other words, the attitude of a prospective purchaser of the high land bordering on Oast's Creek, will very probably not be affected one way or the other by the results of the dredging and filling done in an attempt to relieve the community from the damages that resulted from the filling and the closing of Mason's Creek.

Furthermore, the testimony shows that in September 1941, plaintiff, on behalf of itself and seventy-two other property owners, sent a communication addressed to the Secretary of the Navy, which reads as follows:

NORFOLK, VIRGINIA,
*September 26, 1941.*

To the SECRETARY OF THE NAVY,
*Commandant, Fifth Naval District, Norfolk, Virginia.*

We, the undersigned owning certain lots or parcels of land in the subdivision known as Pamlico, along Oast's Creek, a branch of Mason's Creek, in the City of Norfolk, Virginia, respectfully submit that in connection with the development of the extension

to the Hampton Roads Naval Operating Base in the City of Norfolk, Virginia, and especially with the development and expansion of naval aviation facilities at said base, the channel of said Oast's Creek has been filled with silt and debris to such an
39 extent that the natural drainage of the properties of the undersigned have been materially interfered with, and we hereby respectfully request that such dredging of the channel of Oast's Creek be done, without expense to the undersigned, as may be necessary to remedy the condition aforesaid, and in order that dredging may be accomplished, we, the undersigned property owners, hereby consent to said dredging so as to restore the channel of said creek to its former and normal condition, and request that the work herein referred to be done promptly because of the unhealthful conditions that have been caused by the filling of said channel.

COMMODORE PARK, INC.
By FRANK S. RICHESON, *Pres.*
*Agent for 72 property owners.*

It does not appear from the evidence that any claim was made by plaintiff while the Navy Department was doing the filling and dredging last referred to, to the effect that it was causing additional damage to plaintiff's land. Having petitioned the Navy Department to do this additional dredging, and remained silent while it was being done, I do not think that plaintiff would now be in a position to claim any additional damages as a result of that dredging, even if additional damage had been caused thereby and the other requisites to suing the United States and recovering a judgment against it were established.

The following is a summary of the Court findings of fact with respect to damages to plaintiff's land:

(1) Plaintiff's interior lots have not been damaged by the filling and closing of Mason's Creek and the deposit of mud and silt;

(2) Plaintiff's land in the basin of Oast's Creek, or bordering thereon, has not been damaged by the filling and closing of Mason's Creek or by the depositing of mud and silt by the
40 Navy Department during the (relief) dredging operations in the unfilled part of Mason's Creek;

(3) Plaintiff's lots and parcels of land bordering on the navigable part of Mason's Creek, namely, the six-acre parcel and lots numbered 206, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, and 222, have been damaged in the gross amount of $9,120.00. Those lots and the six-acre parcel have a total straight frontage (not following the meanderings of the high water mark), on Mason's Creek, of 1,824 feet. Considering all of the testimony in

the light of two views of the property in its present condition, the Court finds that an average of Five ($5.00) Dollars per front foot on Mason's Creek for those lots will be just compensation for the depreciation in their fair market value that has directly and proximately resulted from the taking of the riparian rights in Mason's Creek appertaining and belonging thereto and the depositing of mud and silt on the shore and between the high water and low water marks, in the operation of filling the spoils area established by the Navy Department in Mason's Creek. While some of the layer of mud and silt now there was deposited as a result of the dredging done by the Navy Department in the effort to relieve, views of the property leave no doubt that the major part of the mud and silt was deposited there during the filling of the spoils area in the stream. The water used in conveying the dredged materials from the Bay to the spoils area in Mason's Creek, flowed back from the spoils area into the unfilled part of the stream and carried back large quantities of mud and silt, which, due to the closing of the Creek, settled on the bed of the unfilled part of the stream, including plaintiff's land lying between high water and low water marks. The evidence does not show definitely exactly how long that dredging and filling
41 operation lasted. It does indicate unmistakably that it was carried on continuously from sometime in the early autumn of 1940 until about April or May 1941.

(4) The Court further finds that no recovery should be allowed to plaintiff on account of damages to the parcel designated on the plat, "Small Boat Harbor" which has a 100-foot frontage on Mason's Creek. Plaintiff was obligated under its scheme of developing and marketing its property to dedicate that area for the benefit of the purchasers of its property. It was also obligated to dredge out the lot in order to make it fit for use as a small boat harbor. Mr. Richeson, president of plaintiff, estimated that the dredging would cost about $500.00. That estimate, in the opinion of the Court after views of the property, is too conservative. It would have been necessary for plaintiff not only to dredge out the lot, but to dredge from the shore as far out as low water mark in order to make the harbor usable at mean low tide. The testimony offered by plaintiff as to the cost is not very clear or definite. Defendant offered no testimony other than that given by plaintiff's witness on cross-examination. It is therefore necessary for the Court to make the best estimate it can of the probable cost. That estimate necessarily is based very largely upon the Court's inspection of the property. In the opinion of the Court, based upon the limited evidence and its views of the property, the cost of the dredging would have been from $1,000.00 to $1,500.00, or

probably about $1,250.00. However, since the permanent filling and closing of Mason's Creek, a small boat harbor there would be useless and of no value to any of the property. Under these circumstances, since plaintiff is relieved of that cost, its claim against the United States should be credited by the amount of $1,250.00. The Court accordingly finds the total
42 amount of compensation which the plaintiff is entitled to recover is $7,870.00.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court concludes as a matter of law:.

(1) That the Court has jurisdiction of this cause of action and of the parties to the proceeding, under Title 28, U. S. C., Subsection 20 of Section 41;

(2) That plaintiff's riparian rights in Mason's Creek appertaining and belonging to the six-acre tract and to lots numbers 206, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, and 222 as shown on the plat of Commodore Park (Exhibit 5), were taken, and plaintiff's lands lying between high water and low water marks in that stream partially taken by the depositing of mud and silt thereon, by the United States of America in the course and as a result of permanently closing Mason's Creek to all navigation and commerce and permanently taking and appropriating about seventy per cent of the bed of that stream lying west of Granby Street and north of the Virginian Railway, as a spoils area in which to deposit mud and silt dredged from the bed of Willoughby Bay and conveyed from there to said spoils area and deposited therein by the United States;

(3) The dredging in Willoughby Bay was done in the course of and as an incident to enlarging and expanding the aviation shore facilities of the Hampton Roads Naval Operating Base for the purpose of national defense, and not for the purpose of aiding navigation or commerce;

(4) That the public notice given by the United States through the Navy Department, in September 1940, of the intention
43 to fill and close Mason's Creek did not operate to preclude plaintiff from recovering just compensation for its riparian rights and land taken by the United States through said closing and filling of Mason's Creek;

(5) That upon the taking of said riparian rights and the partial taking of said lands of plaintiff, the law implied a contract on the part of the United States to render just compensation to the plaintiff therefor;

(6) That plaintiff is entitled to a judgment against the United States of America for the sum of $7,870.00, being just compensation to the plaintiff for the damages it has sustained as a result of the taking of its riparian rights and lands, as aforesaid, with interest thereon at the rate of six percent per annum from the time said rights and land were taken.

———, ———,
*United States District Judge.*

NORFOLK, VIRGINIA, *July —, 1943.*

In United States District Court

*Order on trial and judgment*

Filed August 24, 1943

This action came on to be tried before the Court, and the evidence adduced by the parties having been duly heard and the court having made its findings of fact and conclusions of law, and filed the same as a part of its written opinion rendered in this cause, the said opinion, including the findings of fact and conclusions of law, is made a part of this judgment by reference as fully as if copied in extenso herein, and it is hereby—

Adjudged that the plaintiff recover of the United States of America the sum of $7,870.00 with interest thereon at the
44 rate of four per centum per annum from the first day of September 1941, until paid; and the Clerk shall record said judgment in accordance with this order.

(S) LUTHER B. WAY,
Luther B. Way,
*United States District Judge.*

NORFOLK, VIRGINIA, *August 24, 1943.*

45 In United States Circuit Court of Appeals,
Fourth Circuit

*Appendix to brief of appellee*

From the testimony of Walter H. Taylor, Norfolk City Engineer (Tr. pp. 80, 81 and 82):

"Q. You do not mean to tell the Court, though, that a pump out in Willoughby Bay, pumping silt or filled material into Boush Creek, when it overflowed it ran for a mile up to the Commodore Park property?

A. That is exactly what I mean to tell the Court.

Q. Without any effect by the tide, whatsoever?

A. What?

Q. Without the tide carrying it.

A. Those tide waters came in and went out at that time, but that did not affect the silt from silting up the coves of Mason's Creek, because it did it, to my own knowledge.

* * * * * *

Q. Did you testify to that?

A. I did not testify that the tide did it, no; I said the pumping operations.

Q. Do you say that the Government pumped silt on the property opposite Commodore Park?

A. I do.

Q. From Willoughby Bay?

A. I do.

Q. When?

A. When they filled all of Boush Creek and Mason's Creek.

Q. When was that? When did you see it done?

A. I would have to refer to the records to get that date; in the last eighteen months.

* * * * *

A. No protest, officially or otherwise, had any bearing on the subject. The Navy, out of the courtesy of Mr. J. C. Pugh, probably, came to us and showed us the plans they had for constructing this so-called culvert and filling up the mouth of Mason's Creek. We protested at that time and all other times when the subject was raised. The Navy did not ask our permission to do it, or wait for our sanction.

Q. Did you make any formal protest?

A. I did. I told you I made it.

Q. To whom, and when?

A. To Admiral Taussig.

Q. That was the original protest to the overflow, which you stated?

A. The others I made frequently to Commander Sanquist.

Q. When?

46 A. During the operations of pumping.

From the testimony of Frank S. Richeson (Tr. pp. 101, 102, 104):

"Q. Mr. Richeson, I hand you a photograph made by the Acme Photo Company on September 25, 1942, bearing the number "42" on the back of the photograph, and I ask you what that illustrates?

A. I will have to refer to the map with my number on it in order to get the exact location. (Witness does.) 42 represents the boat basin.

Q. What is this area shown on the photograph here which appears to be a cracked mud bank?

A. That was the boat basin.

Q. How has that been changed from its natural condition, and by whom?

A. It was filled up by the dredging out of Mason's Creek. I have forgotten the name they call it, but we always called it Mason's Creek.

Q. Do I understand this mud shown here was pumped in there by the United States, or put in there?

A. Yes, sir.

Q. That is on photograph number 42, a direct deposit by the United States?

A. Yes, sir.

Q. What are these cracks, Mr. Richeson, or what appear to be cracks?

A. Just where the sun has hit that mud, and it is just cracked wide open.

Q. Mr. Richeson, I hand you photograph No. 43, and ask you to locate that on the plat.

A. That is looking out on another cove we had, you might say, north of the boat basin.

Q. What does that picture represent?

A. A fill that they dredged from Mason's Creek into this property.

Q. Was that a fill made by the United States in its operations?

A. Yes, sir. You can notice the dykes they put along there to hold it back.

* * * * *

Q. Now I hand you No. 45.

A. That is standing on what was the roadway between the property shown in 46 and Mason's Creek proper, which they filled out beyond that point.

Q. And that represents a fill made by the United States?

A. Yes, sir.

47 Q. And on this property?

A. Yes, sir.

From the testimony of A. Brooke Taylor (Tr. 210, 229, 230):

"A. The waters immediately adjacent to Commodore Park, the shore lines have been materially changed and nearly all of the 20-odd platted waterfront sites have a veneering of mud or silt, I would estimate from six inches to three feet, and one of the serious objections to it, as it comes up to the main original soil and feathers off, now the bulk of what would be low water mark in some cases a year and half ago, would be from 1 to 300 feet wider

out to the channel that had been dredged recently, and that deposit has been put up around these waterfront lots and up into these coves, which, in my opinion, has been very detrimental to the value of that property.

* * * * *

A. To do that semi-accurately, no, your Honor, because it would be necessary to ascertain what the thickness was. In some instances that mud is up on high land, up on clay. They had run those pumps from that dredge up through those trees on high land, and where there was a leak in the joint, it washed holes away and deposited some of that silt * * *

* * * * *

A. I am prepared to say that in certain sites there between the high land and the channel it is one or two feet of thickness of deposits there that was pumped in there, because, no doubt, it was less expensive than to move that two or three miles away.

Q. And you think that damaged the property?

A. I certainly do. Now, as to percentages, I hate to give a horseback opinion, because I can't justify my final conclusion if I commence to talk in dollars and cents."

From the testimony of Frank Killam, (Tr. pp. 272, 273, 276, 278, 279, 281, 284):

"Q. What changes, in a general way, were made by the United States after 1940?

A. Well, the only changes I have noticed is that the mouth of Mason's Creek has been stopped up, except by a flume, that navigability has been stopped, and mud and silt have been pumped into Mason's Creek and on this particular property along the waterfront.

Q. Mr. Killam, is it or not true that a substantial portion of the entire creekbed as indicated on the maps here introduced in evidence has been filled in?

A. I think it has.

* * * * *

48 Q. The Court asked of the preceding witness whether or not it was possible to separate the amount of damage with respect to the several conditions which are believed to have caused it. State whether or not you considered the different factors making the total damage in reaching your conclusion.

A. No, Mr. Ashburn; I considered them as a whole. I think it might be possible to arrive at some percentage of each, but it would require considerable investigation.

Q. Have you any conclusion on that score that would be helpful to the Court?

A. I have thought over it for the last hour or two, and I think it might be somewhere around fifty-fifty, about half each, but that is not mature consideration; it is just a rough guess at it.

Q. It is an expression of opinion based upon the thought that you have given it for an hour or two?

A. Yes.

Q. When you say it might be considered around fifty-fifty, fifty percent caused by what and the remaining fifty percent caused by what?

A. Fifty percent caused by the closing of Mason's Creek to navigation—that a man can't keep a motorboat and get to open water—and the other fifty percent is caused by the deposit of the mud around the shores of the creek—mud and sewage dredged from the bottom of the creek, and silt.

* * * * *

Q. In other words, your opinion, as I understand it, is that fifty percent of the $18,000, or approximately so, is due to the inability to use Mason's Creek for navigation purposes?

A. That is right.

Q. And fifty percent is due to what?

A. Damage from sewage deposited on the bottom of the creek and around the shores, and the mud deposited on the shores.

* * * * * *

Q. That is what I am coming to. Of the fifty percent due to, we will say, the dredged material being put on this property, what proportion of that, if any, do you consider was occasioned by the silt from the dredging of Willoughby Bay being carried up on this property?

Mr. Ashburn. You mean, being naturally carried there, or carried there by the Government?

Mr. Holt. We did not carry any physically from Willoughby Bay.

The WITNESS. I think you did, Mr. Holt.

* * * * *

49 A. The pumping was in Mason's Creek, and that silt went all up these banks.

Q. I understand that; that silt was carried up to this property, too, was it, in your opinion?

A. I think some of it was, yes—I think all of it was.

* * * * *

Q. Can you give us any estimate, in your opinion, as to the approximate depth of that silt?

A. No, but I think, Mr. Holt, that that helped the damage—that made the damage worse, because I think that silt deposited on the shores of Commodore Park—it has killed the bulrushes

and destroyed the view to a certain extent, and then when the sewage commenced to collect on the bottom of the creek, and when you put the other dredge in there, you just kept building that silt up; you piled one on top of the other.

Q. I don't understand what you mean by that.

A. By dredging up the creek you put more mud on top of the silt.

Q. That increased the damage?

A. Yes; but how much, I don't know. I don't think anybody in the world could tell you. One came after the other and it helped build up the damage.

Q. And you could not give us any help on that?

A. No way in the world."

In the United States Circuit Court of Appeals for the Fourth Circuit

No. 5223

UNITED STATES OF AMERICA, APPELLANT

*vs.*

COMMODORE PARK, INCORPORATED, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

*Docket entries*

January 13, 1944, the transcript of record is filed and the cause docketed.

Same day, order extending the time until February 7, 1944, for filing the record on appeal and docketing the action, is filed.

January 15, 1944, the appearance of Sterling Hutcheson, United States Attorney, is entered for the appellant.

Same day, the appearance of W. R. Ashburn is entered for the appellee.

50 January 18, 1944, the appearance of H. H. Holt, Jr., Special Assistant to the Attorney General, and Vernon L. Wilkinson, Attorney, Department of Justice, is entered for the appellant.

February 23, 1944, order as to the original exhibits, together with the original exhibits, are certified up.

April 3, 1944, brief and appendix on behalf of the appellant are filed.

April 5, 1944, is stipulation as to the time for the filing of the respective briefs is filed.

April 8, 1944, brief and appendix on behalf of the appellee are filed.

April 13, 1944 (April term, 1944) cause came on to be heard before Soper, Dobie and Northcott, Circuit Judges, and was argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 5222

UNITED STATES OF AMERICA, APPELLANT

*vs.*

COMMODORE PARK, INCORPORATED, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued April 13, 1944. Decided June 23, 1944)

Before SOPER, DOBIE, and NORTHCOTT, Circuit Judges

Vernon L. Wilkinson, Attorney, Department of Justice (Norman M. Littell, Assistant Attorney General, and Harry H. Holt, Jr., U. S. Attorney, on brief) for Appellant, and W. R. Ashburn for appellee.

*Opinion filed June 23, 1944*

SOPER, Circuit Judge:

Commodore Park, Incorporated, the owner of real estate in the City of Norfolk, Virginia, brought this suit under the Tucker Act, 28 U. S. C. A. § 41 (20), to recover compensation for land and riparian rights alleged to have been taken by the United States in the enlargement of the Hampton Roads Naval Operating Base, especially its aviation facilities, and in the improvement of the navigability of the adjacent waters of Willoughby Bay. The defense was that the acts complained of were performed
51 by the United States in the exercise of its control over commerce and navigation and that no liability to the plaintiff arose therefrom, although certain riparian rights, which the plaintiff had previously enjoyed, were destroyed in the course of the work. The District Judge entered a judgment for the plaintiff and this appeal followed.

The plaintiff acquired a tract of farm land in Norfolk, Virginia, eon August 20, 1940 for a real estate development and subsequently expended large sums in improving it for residence purposes, dividing it into lots and erecting houses. When the land was purchased

it bordered upon a navigable stream known as Mason Creek which extended southerly from Willoughby Bay for a distance of four or five miles. The land was located on the east side of the creek about one and a quarter miles from the point where it entered the bay and the lots bordering on the creek were deemed especially desirable for residential purposes.

During the summer of 1940 certain plans that had been in the process of formation by officers of the United States for some time came to a culmination. It was decided to enlarge the aviation shore facilities at the Naval Air Station which was then located on the west side of Mason Creek and the south side of Willoughby Bay. The first Supplemental National Defense Appropriation Act of June 26, 1940, 54 Stat. 599, 607, 608* appropriated certain sums for the national defense for the fiscal year ending June 30, 1941, including $18,000,000 for additional shore facilities, additional aviation storage facilities, buildings, store houses, accessories, and the acquisition of land at the Naval Base. Pursuant to this Act a contract was executed on June 29, 1940, by the United States and a contract for a project, entitled Aviation Shore Facilities, which called for the construction of "bulkheads, dredging, and fill and preparation of landing field" as well as the erection of certain structures, changes in the location of roads, pipe lines, and the like at a total estimated cost of $13,700,000.

It was contemplated under this contract that a large seaplane operating base should be developed on the south shore of Willoughby Bay. To this end it was planned to improve the navigability of Willoughby Bay by dredging it to depths from 10 to 14 feet below mean low water so as to provide sufficient areas and depths of water for large patrol seaplanes; and it was also planned to deposit the dredged materials in creeks, sloughs and low areas bordering on Mason and Boush Creeks behind bulkheads, and if necessary, to fill all or a large part of Boush Creek.

52 In recognition of the authority vested in the War Department in regard to the obstruction of navigable waterways by §§ 9 and 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, application was made to the War Department for permission to do the work and permission was granted in due course. Subsequently, on May 13, 1941, the War Department authorized as an amendment of the plan that Mason Creek be permanently closed to all navigation.

The United States proceeded to condemn all the remaining land on the west side of Mason Creek to the head waters thereof as an addition to the Naval Station on this side of the creek and also

*Prior Acts of Congress which provided for the acquisition of additional land for the Naval Station were the Act of June 14, 1934, 48 Stat. 957; the Act of April 25, 1939, 53 Stat. 590; and the Act of May 25, 1939, 53 Stat. 757, 773.

condemned nearly all the land on the east side of the creek except the land of the plaintiff, none of which was condemned. Condemnation proceedings took place in 1940, 1941 and 1942 and included some 2,000 acres of land. In the course of the dredging operations 18,000,000 cubic yards of mud and silt were taken from the bed of Willoughby Bay and deposited in the creeks and condemned areas south of Willoughby Bay. Mason Creek was filled to a point near the plaintiff's land and a retaining wall was constructed. For this distance the natural channel of the creek, which was about 550 feet wide at the mouth, was filled from side to side and to a height equal to the highest point of the adjoining land; and immediately opposite the land a pond or sink was left

The result was that the riparian rights appertaining to the land in its prior condition, including the right of access to the navigable waters of the creek and the bay, the utilization of the creek in its natural condition and the advantageous surroundings which it contributed to the adjoining property, were destroyed. The findings of the District Court in this respect were as follows:

"Mason's Creek afforded a ready, convenient outlet from plaintiff's land into Willoughby Bay, and Hampton Roads by motor boats and other vessels of light draft. That stream, so far as the evidence discloses, had never been improved by Governmental action, but, in its natural state, was a very attractive tidal, navigable stream. * * *

The shores on the westward and northwestward sides of plaintiff's land bordered on the navigable part of Mason's Creek and were high, firm, sandy shores, slanting down gradually between high and low water marks. The waterfront lots on that side before the filling and closing above described, were desirable for waterfront residential property. The presence of navigable water and the riparian rights such as fishing, boating, and the like, incident to the land, contributed very substantially to both its intrinsic and fair market value.

53 By filling and closing Mason's Creek all of plaintiff's riparian rights were permanently taken. The part of Mason's Creek not filled was converted into a lake without any outlets, sewers and surface drainage emptied therein and the water became stagnant and filthy. The water used in conveying through pipes the dredged materials from the Bay to the parts of Mason's Creek filled, overflowed the bulkheads and dykes and carried great quantities of mud and silt into the parts of Mason's Creek not filled, and much of it settled along the shore and to a substantial depth on plaintiff's land lying between high and low water marks, and permanently converted that land into undesirable spongy mud bottom."

The District Judge also found that the unfavorable conditions resulting from the work led to vigorous protests by nearby residents and in consequence the Navy Department constructed a culvert from the unfilled part of the creek to the bay and also dredged a channel in the remaining part of the stream deeper than that which had previously existed. Sufficient drainage to prevent an overflow under normal conditions was thereby provided, but the water in the unfilled part of the creek remained semistagnant and was not fresh and clean as it had previously been in the open creek. This relief dredging gave rise to the additional claim on the part of the plaintiff that mud and silt had been deposited on its land, not only between high- and low-water marks but also above high-water mark. But the District Judge disallowed this part of the claim as he found that no material damage had been suffered in excess of the benefit which the plaintiff had derived from the partial filling of low marshes, inlets, and coves on its property. No appeal was taken by the plaintiff.

The ultimate conclusions of the court were that the plaintiff's riparian rights in Mason Creek appertaining to 13 of the lots in Commodore Park were taken and its lands lying between high-water and low-water marks in the stream were partially taken by the deposit of mud and silt thereon in consequence of the permanent closing of Mason's Creek, and the permanent taking of a large part of the bed of the stream as a spoils area for the deposit of mud and silt dredged from Willoughby Bay. The court also found that the dredging in Willoughby Bay was done in the course of and as an incident to enlarging and expanding the aviation shore facilities of the Hampton Roads Naval Operating Base for the purpose of national defense and not for the purpose of aiding navigation or commerce. Upon these findings the court concluded that the plaintiff was entitled to compensation for this taking of its riparian rights and partial taking of its land and entered a judgment in the sum of $7,870 with interest at 4 per cent from September 1, 1941.

54 The position of the United States is that since Willoughby Bay and Mason Creek were both navigable waters of the United States when the improvement of the naval base was undertaken, they were within the control of the Government and any private riparian rights in the waters or bed of Mason Creek incident to the ownership of the lands bordering upon the stream were subservient to the dominant power of Congress to improve navigation under the Commerce Clause of the Constitution. This legal proposition is firmly established and cannot be denied. In United States v. Chicago, M. St. P. & P. R. Co., 312 U. S. 592, 596–7, it was said:

"* * * And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone. Whether, under local law,* the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low-water mark, the rights of the title holder are subordinate to the dominant power of the Federal Government in respect of navigation.

"The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability.

"The bed of a river is 'that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.'

"The dominant power of the Federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

Again, in United States v. Appalachian Power Co., 311 U. S. 377, 423–4, it was said:

"The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise.
55 Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i. e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Gov-

*Under the Virginia law the title of an owner of land bordering upon a navigable stream extends to the ordinary low-water mark. Scott 1. Doughty, 124 Va. 358; Hite v. Town of Luray, 175 Va. 218.

ernment has domination over the water power inherent in the flowing stream. It is liable to no one for its use or nonuse. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

In the exercise of this power it has been held that it is not a taking compensable under the Fifth Amendment when the United States, in order to improve navigation, completely ousts the riparian owner from the use of a navigable stream, or removes valuable structures which he has erected therein, or appropriates a portion thereof for a pier, lighthouse, drydock or other structure; Scranton v. Wheeler, 179 U. S. 141, 163; United States v. Chandler-Dunbar Co., 229 U. S. 53, 62, 72; Gibson v. United States, 166 U. S. 269; or when for the same purpose the Government injures or destroys riparian rights by straightening the channel of a stream or by closing one channel and diverting the water therein to another channel of a stream; South Carolina v. Georgia, 93 U. S. 4; Friend v. United States, 30 C. Cls. 94. Moreover, it is established that the power of the United States to improve navigation is but a part of its broader power to regulate commerce and that if an improvement serves the larger purpose, it may be made without compensation to a riparian owner even if it interferes with the navigation of the stream, as for example, the erection of a bridge over navigable waters. Stockton v. Baltimore & N. Y. R. Co., C. C. N. J., 32 F. 9, cited in Scranton v. Wheeler, 179 U. S. 141, 149, 159, 161; see also, Arizona v. California, 283 U. S. 423, 451–2; Washington Water Power Co. v. United States, 9 Cir., 135 F. 2d 541. The injuries suffered by the private owners in all these cases are damnum absque injuria.

Relying upon these authorities the Government points out that the damage to the plaintiff's land in the pending case was not
different in its nature from the substantial losses suffered by
56 the riparian owners from governmental act is in the cited
cases; and it is said that in this case as in those, the United States was acting wholly within the scope of its powers over navigable waters which the Supreme Court on more than one occasion has spoken of "as the public property of the nation." Gilman v. Philadelphia, 3 Wall. 713, 724–5; United States v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592, 596.

We agree to the extent of saying that the District Judge was wrong insofar as he held that the dredging of Willoughby Bay was not done for the purpose of aiding navigation or commerce. Although the deepening of the bay was incident to the enlargement of the Naval Base for national defense and the primary pur-

pose to be served by the dredging was the accommodation of naval seaplanes and vessels, the project, nevertheless, related to commerce and navigation and was carried out in the exercise of the governmental power in this field. The Supreme Court has held that the control of the federal government over navigation may be exercised in order to accommodate naval vessels. In Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, the court sustained the power of the Government to cause the removal of private structures from a river to provide mooring space for its ships, saying (p. 268):

"We may grant that such was the inducement and such the occasional use, but neither militates against the validity of the power exercised. The mooring of vessels is as necessary as their movement, and the navigability of a river can be maintained or increased as legally for the accommodation of war vessels as for trading vessels, those of public ownership as well as those of private ownership, and we cannot enter into a consideration of what may be necessary for either purpose." See also, Baily v. United States, 63 Ct. Cl. 77, certiorari denied 273 U. S. 751.

None of these considerations, however, touch the vital fact in the case at bar that the deposit in Mason Creek of the material dredged from Willoughby Bay had no relationship to navigation or commerce. The deepening of the one body of water and the fill in the other were not integral and related parts of a single enterprise, as happened, for example, in South Carolina v. Georgia, 93 U. S. 4, where one of two channels of a stream was closed to the detriment of a riparian owner in order to improve the navigability of the other channel. Doubtless the method devised by the engineers for the disposition of the refuse was economical and expeditious but the result of it was that the navigability of the stream was permanently impaired while the navigability of the bay was improved to no greater extent than if the dredged
57 material had been hauled to a more distant point. In short, the closing of the stream did not in any way serve the interests of commerce or navigation.

The United States is not clothed with unlimited authority to deal with navigable waters as if they were its own.* The statement of the Supreme Court that the navigable waters of the United States are "the public property of the nation" was not intended

*There is no authority for the broad proposition that the United States has the absolute right to deposit material dredged from navigable waters in any other navigable waters within its control. A statement from the opinion of the Attorney General in 22 Opp. Atty. Gen. 649, seems to give support to such a rule, but only when separated from its context. It was made in support of the power of the United States to deposit material, which it had dredged from Lake Erie, in the Lake within eight miles of the City of Chicago notwithstanding the prohibitory provisions of a city ordinance. The Attorney General was merely deciding that the authority of the United States over the navigable waters of the Lake was superior to that of the municipality. No private riparian rights were involved.

to convey the idea that the United States has the absolute ownership of the beds of navigable streams and may make any use of them that it sees fit. The exact language used by the Supreme Court in United States v. Chicago, M. St. P. & P. R. Co., 312 U. S. 592, 595–6, quoting from Gilman v. Philadelphia, 3 Wall. 713, 724, was: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress".** That the power and control of the national government over navigable waters is limited to the purpose set out in the Constitution is shown by what was said in United States v. Appalachian Power Co., 311 U. S. 377, 426:

"In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce." * * *

The last mentioned case cited with approval the prior decision of the court in United States v. River Rouge Co., 269 U. S. 411, wherein the limits of the power of the United States over navigable waters was emphasized in the following passage (p. 419):

"The right of the United States in the navigable waters within the several States is, however, 'limited to the control there-
58 of for the purposes of navigation.' Port of Seattle 1. Oregon Railroad, 255 U. S. 56, 63. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Co., 229 U. S. 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. In Yates v. Milwaukee, 10 Wall, 497, 504, it was said in reference to the right of a riparian owner on a navigable stream: 'This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' This language was cited with approval in Illinois Central Railroad v. Illinois, supra, 445."

**Italics supplied.

In view of this limitation upon the power of the Government and the finding that the closing of Mason Creek did not aid either commerce or navigation, the judgment of the District Court will be affirmed.

Affirmed.

*Dissenting opinion*

DOBIE, Circuit Judge, dissenting:

I must dissent from the majority opinion on one phase of this case. It seems to me that the dredging was clearly in furtherance of commerce and navigation and that the deposit of the dredged material in Mason Creek was an integral part of this improvement in navigation.

Accordingly, I think that Commodore Park is entitled to no recovery from the United States for any damages resulting from the destruction of its riparian rights through the deposit of the dredged material between the low-water mark and the high-water mark of Mason Creek. See Transportation Co. v. Chicago, 99 U. S. 365; Gibson v. United States, 166 U. S. 269, 273; Scranton v. Wheeler, 179 U. S. 141; Slingerland v. International Contracting Co., 169 N. Y. 50; Home for Aged Women v. Commonwealth of Massachusetts, 202 Mass. 242. And see, particularly, the opinion of Attorney General Griggs (1899), 22 Opp. Atty. Gen. 649, in which it was said:

"Congress has power to regulate and improve harbors of the navigable waters of the United States, and this carries with it the right to deposit the material removed in making improvements in any other part of the harbors or navigable waters or other place within its control."

59 In United States Circuit Court of Appeals,
Fourth Circuit

No. 5223

UNITED STATES OF AMERICA, APPELLANT

*vs.*

COMMODORE PARK, INCORPORATED, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia

*Judgment*

Filed and Entered June 23, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

Of consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 23d, 1944.

MORRIS A. SOPER,
*U. S. Circuit Judge,*

July 17, 1944, petition of appellant for a stay of mandate is filed.

In United States Circuit Court of Appeals

*Order staying mandate*

Filed July 19, 1944

Upon the application of the Appellant, by its counsel, and for good cause shown,

It is ordered that the mandate of this court in the above-entitled cause be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 40 days from this date.

July 18, 1944.

JOHN J. PARKER,
*Senior Circuit Judge.*

August 24, 1944, petition of appellant for a further stay of mandate is filed.

60 In United States Circuit Court of Appeals

*Order further staying mandate*

Filed August 26, 1944

Upon the application of the Appellant, by its counsel, and for good cause shown,

It is ordered that the mandate of this court in the above-entitled cause be, and the same is hereby, further stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 30 days from this date.

August 25, 1944.

JOHN J. PARKER,
*Senior Circuit Judge.*

[Clerk's certificate to foregoing transcript omitted in printing.]

61 Supreme Court of the United States

No. 495, October Term, 1944

*Order allowing certiorari*

Filed November 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as through filed in response to such writ.

62 In the Supreme Court of the United States

October Term, 1944

No. 495

*Stipulation as to record*

Filed Nov. 28, 1944

Subject to the Court's approval, it is hereby stipulated and agreed by the attorneys for the respective parties hereto that for purposes of the hearing on the writ of certiorari in the above case the printed record shall consist of the printed record designated as such for purposes of the petition for certiorari.

It is further agreed that the parties may refer in briefs and argument to portions of the original transcript of record filed with the Supreme Court of the United States and not included in the printed record as herein designated.

CHARLES FAHY,
Charles Fahy,
*Solicitor General.*
W. R. ASHBURN,
W. R. Ashburn,
*Counsel for Respondent.*

Dated November 15th, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944